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No. 95-590

IN THE

Supreme Court of the United States

October Term, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Petitioner,

v.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC., AND BILLY GRUBBS,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED AND RESTATED

1.WHETHER THE FIRST AMENDMENT RIGHT TO PETITION IMMUNIZES AN AUTOMOBILE MANUFACTURER FROM ITS VIOLATION OF FLORIDA'S DEALERSHIP TRANSFER LAW CAUSED BY ITS REFUSAL TO RECOGNIZE A FRANCHISE TRANSFER.

2.WHETHER THE COURT OF APPEALS ERRED IN EXERCISING ITS DISCRETION NOT TO CERTIFY TO THE FLORIDA SUPREME COURT STRAIGHTFORWARD, NON-DISPOSITIVE STATE LAW ISSUES WHICH HAVE NO BEARING ON ANY FEDERAL CONSTITUTIONAL ISSUE.

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STATEMENT OF THE CASE

Mercedes-Benz of North America, Inc. ("Mercedes-Benz") sets out in detail the numerous and bitter battles which it has waged over the past ten (10) years against Mike Smith Pontiac, GMC, Inc. ("MSP").[1] Ultimately, however, this case

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1 An objective account of the history of the Mercedes-Benz-MSP franchise relationship and surrounding litigation is found in the controlling decision of Florida's First District Court of Appeal, *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So.2d 620, 621-22 (Fla. 1st Dist. Ct. App.), *review denied*, 574 So. 2d 142 (Fla. 1990) (App. A).

centers upon the proposed transfer of MSP's Mercedes-Benz dealership to Terry Taylor ("Taylor"),[2] a transfer which Mercedes-Benz was required to recognize under Section 320.643(2), Florida Statutes (1985) ("dealership transfer law") (App. B). The Florida First District Court of Appeal ("the First DCA") has held in a previous stage of this very litigation that, under Section 320.643(2), Mercedes-Benz could avoid this obligation only if it mounted a successful challenge to the proposed transferee's qualifications. *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So. 2d 620, 624 (Fla. 1st Dist. Ct. App.), *review denied*, 574 So. 2d 142 (Fla. 1990) (App. A). That same state court found that Mercedes-Benz's only reason for unlawfully refusing to recognize the MSP-Taylor dealership transfer was the vague threat of a lawsuit against Mercedes-Benz by Cutler, a disgruntled formerly proposed transferee. *Id.*

The state court held that this statutorily unauthorized reason could not excuse Mercedes-Benz's unlawful refusal to recognize the dealership transfer, and that a transfer of the franchise resulted. *Id.* at 624-25. Thus, Taylor has been wrongfully deprived of MSP's Mercedes-Benz dealership by Mercedes-Benz and has suffered lost profits as a consequence, even while Mercedes-Benz admitted at trial that Taylor was qualified to be a Mercedes-Benz dealer. [R 29-(205, 220, 300).]

The circuit court of appeals, the district court, the First DCA, and the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") have all held that vague threats of suits from third parties are not grounds for refusing to

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2 The proposed transferees of MSP's dealership, Terry Taylor, Billy R. Grubbs, and Terry Taylor Investments, Inc., will be collectively referred to as "Taylor." Terry Taylor Investments, Inc. has no parent or subsidiaries.

recognize a dealership transfer under Florida law, and that the only permissible objection is to the transferee's qualifications. Thus, Mercedes-Benz's unlawful refusal to recognize the dealership transfer could not be justified, constituting an express violation of part of Sections 320.60-.70, Florida Statutes (1985) (Florida's Dealer Protection Act). Under Section 320.697, Florida Statutes (1985) (App. C), the only requirement for a cause of action is a violation of Sections 320.60-.70. Mercedes-Benz's illegal conduct thus gave Taylor a statutory cause of action. Ignoring that Taylor was fully qualified to be its dealer and the decisions of both the DHSMV and the First District Court of Appeal, Mercedes-Benz irrationally chose to violate Florida's dealership transfer law.

For purposes of its petition, Mercedes-Benz must concede that it violated Florida's Dealer Protection Act. Otherwise, it would be unnecessary for this Court to decide any federal constitutional issue, precluding the exercise of this Court's jurisdiction. *See Rescue Army v. Municipal Court,* 331 U.S. 549, 568-74 (1947) (Supreme Court will not exercise its jurisdiction to decide a constitutional issue when an alternative ground is presented which will avoid constitutional adjudication). Mercedes-Benz argues, however, that it is not responsible for its violation of Florida law, because the First Amendment right to petition somehow usurps Florida's statutory scheme and protects a manufacturer from the consequences of violating these state statutes.

Mercedes-Benz fundamentally misstates the case when it asserts that the "sole basis" for its statutory liability was because it filed an administrative complaint. [Petition at 17.] Contrary to Mercedes-Benz's unsupported assertion that Mr. Taylor claimed damages simply because Mercedes-Benz filed an administrative complaint which was dismissed as it failed to meet statutory requirements,

Mr. Taylor unequivocally testified that he was damaged because he could not obtain the Mercedes-Benz franchise:

> Q. Sir, did you suffer financial losses as a result of not obtaining the Mercedes-Benz franchise in 1987?
>
> A. (Taylor) Definitely, yes, sir.

[R 23-107.] The reality and amount of Taylor's lost profit damages are not challenged by Mercedes-Benz.

Taylor has undeniably suffered and will continue to suffer injury as a direct consequence of Mercedes-Benz's illegal actions in refusing to recognize a franchise transfer which a Florida court has already once held Mercedes-Benz must recognize. *Mercedes-Benz,* 561 So. 2d at 624-25. The jury acknowledged this holding by rendering a verdict in Taylor's favor on the only claim he asserted against Mercedes-Benz. [R 15-262-1.] The verdict of the jury applied provisions of Florida's dealership transfer law, which had already been definitively interpreted by a Florida appellate court in this very matter, only two years before the verdict. [R 15-248-(6-7)]; *Mercedes-Benz,* 561 So. 2d 620 (Fla. 1st Dist. Ct. App. 1990). In this diversity case, the jury's verdict for Taylor was directly based on that controlling state court interpretation of state law, and confirmed that Mr. Taylor was an innocent victim who had been extensively damaged by Mercedes-Benz's refusal to recognize the transfer of MSP's dealership.

Section 320.643(2), Florida Statutes (1985), requires a motor vehicle manufacturer to recognize the transfer of any dealership equity interest to a qualified transferee. As a condition for a manufacturer to attempt to prevent such a transfer, it is required to file an administrative complaint with the DHSMV, which must challenge the qualifications of the proposed transferee:

> A licensee [manufacturer]...may...file with the department a verified complaint for a determination that the proposed transferee is not a person **qualified** to be a transferee under this section.

FLA. STAT. § 320.643(2)(a) (1985) (emphasis added). An automatic transfer of the franchise results by operation of law if and only if: (1) the manufacturer violates the statute by failing or refusing to recognize a proposed transfer, and (2) fails to justify its actions through a successful challenge to the transferee's qualifications. *Id.* Section 320.697, Florida Statutes (1985), provides a treble damages remedy to "any person" harmed by a manufacturer's violation of Florida's Dealer Protection Act (Sections 320.60-.70), including Section 320.643(2), the dealership transfer law.

After Mercedes-Benz was advised of the proposed transfer of MSP's dealership to Taylor, Mercedes-Benz informed MSP's principals that Mercedes-Benz was rejecting the proposed sale. [Plaintiff's Exhibit ("Px") 92.] Mercedes-Benz then filed a complaint with the DHSMV objecting to the transfer, expressly invoking the authority of Section 320.643(2). [Px 93-1.] The DHSMV dismissed Mercedes-Benz's complaint with prejudice, because it contained no statutorily required allegation that Taylor was unqualified to be a transferee and because it lacked the statutorily required verification. [Px 121-(2-3).] In accordance with Section 320.643(2), the DHSMV ordered that the franchise agreement was deemed amended to substitute Taylor for MSP as Mercedes-Benz's franchisee. [Px 121-3.]

Mercedes-Benz appealed the DHSMV's order to the First DCA, raising in that court Mercedes-Benz's constitutional attacks on the DHSMV's application of Section 320.643(2) to Mercedes-Benz. In the First DCA, Mercedes-Benz raised a federal due process challenge and a challenge based on the right of access to courts under Article I, Section 21 of

Florida's Constitution. In its petition, Mercedes-Benz now claims that the First DCA did not have the "opportunity" to consider its First Amendment argument. [Pet. at 17 n.12]. Mercedes-Benz ignores that the reason no such "opportunity" occurred was because it failed to raise its First Amendment right to petition argument in the state court in an effort to prevent the statutory transfer of the franchise and the consequential violation of Florida law from refusing to recognize the transfer. [Px 192 (24-28; 42-43).] Thus, having failed to timely raise this argument in the state court proceeding which was binding on it, Mercedes-Benz is foreclosed under basic principles of *res judicata* from attempting to raise this argument now.

Rejecting Mercedes-Benz's constitutional arguments, as well as its argument that it could raise other types of objections to the transfer, the First DCA held that Mercedes-Benz's complaint under Section 320.643(2)(a) was facially deficient in two respects. *Mercedes-Benz,* 561 So. 2d at 624. The court held that a complaint under this provision "must allege that the proposed transferee is not qualified under the terms of the statute." *Id.* (emphasis added). Examining the whole of Section 320.643, the court found that the only "qualifications" referred to anywhere in the statute were the proposed transferee's moral character and business experience. *Id.* The state court noted that Mercedes-Benz's complaint raised absolutely no objection to Taylor on any basis and was not verified:

> In the instant case, [Mercedes-Benz's] complaint was silent as to the qualifications of the Taylor transferees. In fact, the only basis for [Mercedes-Benz's] complaint was its fear that Cutler, the first-proposed transferee, would successfully force a transfer under the original transfer agreement. Since this is not a proper basis for a transfer challenge, the Department correctly dismissed

> the complaint. The complaint's verification, which was conditional and therefore inadequate, constituted further grounds for dismissal.

Id. (footnote omitted). As Mercedes-Benz's complaint plainly failed to meet the requirements of Section 320.643(2)(a), it could not begin to excuse Mercedes-Benz's continued, unlawful refusal to recognize the dealership transfer. As a result, the state court held that a "transfer" of the franchise to Taylor was effected "by operation of law." *Id.* at 625.

Subsequently, Taylor brought a counterclaim in the federal district court, seeking damages under Section 320.697, Florida Statutes (1985), for Mercedes-Benz's refusal to recognize the transfer of MSP's dealership to Taylor in accordance with Section 320.643(2). Mercedes-Benz acknowledged during trial that it has never raised any objections whatsoever to Taylor as the proposed operator of this Mercedes-Benz dealership:

> The Court: [A]nd frankly, the evidence here is that there were no objections to Mr. Taylor
>
> Mr. Dunaj: [Mercedes-Benz's counsel] Absolutely.
>
> The Court: — either in fact or in the petition –
>
> Mr. Dunaj: That's right.
>
> The Court: — to his qualifications and moral character.

[R 37-(36-37).] Based upon Section 320.643(2), and the First DCA's interpretation and application of that statute in the previous stages of this litigation, the federal district court granted partial summary judgment to Taylor and MSP on the issue of Mercedes-Benz's violation of Section 320.643(2). [Px. 8-152-(10-12).] The issues of causation, the defenses of mitigation, and the amounts of damages were all submitted

to the jury. [R 14-248-(6-7, 17-21).] The jury found in favor of Taylor and MSP on their claims for damages arising from violation of Section 320.643(2).

On appeal by both sides, the Eleventh Circuit Court of Appeals affirmed the judgment against Mercedes-Benz, which had challenged the application of *res judicata*/collateral estoppel and Taylor's standing under the Florida statute. Mercedes-Benz also raised its argument asserting immunity from liability under the First Amendment right to petition coupled with the right to access courts under Florida's Constitution. The court of appeals reversed the district court's determination that treble damages were permissive and held that Florida's statutory scheme required that these damages be trebled as a matter of law. However, the court of appeals nowhere addressed Mercedes-Benz's First Amendment argument, obviously finding it completely meritless. Even the dissent, which did "not ... take issue with the Court's result," did not address the First Amendment issue, but was only concerned with certification of certain issues to the state supreme court. *Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 32 F.3d 528, 535 (11th Cir. 1994) (Hill, J., dissenting), *petition for cert. filed*, 64 U.S.L.W. 3297 (U.S. Oct. 11, 1995) (No. 95-590).

SUMMARY OF ARGUMENT

There is no basis for granting the petition predicated on Mercedes-Benz's arguments concerning the First Amendment right to petition and the related *Noerr-Pennington* doctrine, because these issues are nowhere addressed by the court of appeals. Furthermore, the right to petition has no possible application to Mercedes-Benz's actions in this case, because Taylor's damages are caused by Mercedes-Benz's illegal refusal to recognize the transfer of its franchise, not by its filing an invalid and meaningless administrative complaint. Mercedes-Benz unquestionably failed to follow the requirements of Florida's dealership transfer law, and therefore cannot claim that its actions in defiance of Florida law are protected by the right to petition or the *Noerr-Pennington* doctrine.

The court of appeals correctly exercised its discretion in not certifying certain state law issues to the Florida Supreme Court. Each of these issues was readily determined by the application of well-established principles of Florida law. Further, the state law issues, in themselves, were not determinative of the entire case, a jurisdictional requirement for certification to the Florida Supreme Court. The court of appeals properly exercised its discretion based on additional factors of increased delay and expense. There is certainly no valid basis for concluding that the court of appeals erred in its discretionary decision not to certify the particular issues in this case.

REASONS FOR DENYING THE PETITION

I.

THE FIRST AMENDMENT RIGHT TO PETITION IS NOT IMPLICATED BY MERCEDES-BENZ'S VIOLATION OF FLORIDA LAW IN REFUSING TO RECOGNIZE THE MSP-TAYLOR DEALERSHIP TRANSFER.

Mercedes-Benz claims that the decision in this case creates conflict with decisions of other federal circuit courts and with decisions of this Court based on Mercedes-Benz's asserted First Amendment right to petition. However, the court of appeals' decision in this case nowhere addressed (including the dissent) this issue of the right to petition. Thus, the decision in this case could not possibly create inter-circuit conflict, and could not possibly be inconsistent with the decisions of this Court. Conflict which will support review by certiorari cannot be based on pure inference and speculation. Rather, there must be a "real and embarrassing conflict of opinion." *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951). Since the court of appeals neither "rendered a decision in conflict" with another court of appeals' decision nor "decided a federal question" in conflict with this Court's decisions, there is no palpable basis for granting certiorari. *See* SUP. CT. R. 10.

Mercedes-Benz further argues that there is some theoretical disagreement among the circuits as to whether a doctrine derived from the First Amendment right to petition, the *Noerr-Pennington* doctrine, applies outside of antitrust cases. However, this point is completely irrelevant to this case. Indeed, Taylor never argued to the court of appeals that the *Noerr-Pennington* doctrine was limited to antitrust cases, so it is impossible to ascertain that this was the reason the court of appeals decided not to address

Mercedes-Benz's arguments. Furthermore, Mercedes-Benz raised these same right to petition/*Noerr-Pennington* arguments in its petition for rehearing *en banc*, to which no response was filed. Yet, once again not a single judge on the entire court voted to rehear this First Amendment issue. Thus, Mercedes-Benz's assertion that the *Noerr-Pennington* doctrine's inapplicability outside of antitrust cases formed the basis of the court of appeals' decision is utter speculation.

What Mercedes-Benz steadfastly ignores is that its First Amendment argument suffers from a far more fundamental defect which was much more likely the real basis for its rejection. Mercedes-Benz did not become liable for statutory damages by simply filing a legally nugatory administrative complaint. As Florida's dealership transfer law makes clear, Taylor is given a cause of action to seek recovery for damages resulting from Mercedes-Benz's unlawful refusal to recognize the transfer of MSP's dealership to Taylor:

> [A] licensee [manufacturer] shall not...fail or refuse to give effect to, [or] prevent...any motor vehicle dealer...from selling, assigning, [or] transferring...in whole or in part, the equity interest...in such motor vehicle dealer to any other person....

FLA. STAT. § 320.643(2)(a) (1985). Taylor's damages, consisting of lost sales profits due to Mercedes-Benz's refusal to recognize the dealership transfer, were caused by his loss of the Mercedes-Benz franchise, not by Mercedes-Benz's act of filing a meaningless complaint with the DHSMV.[3]

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3 The jury instructions also made clear that Taylor's and MSP's claims were "that they each suffered pecuniary damage because Mercedes-Benz violated § 320.643 of Florida's Dealer Protection Act by refusing to approve the proposed transfer of the franchise...." [R 15-248-6] (emphasis added).

Mr. Taylor's testimony made this point abundantly clear. [R 23-107.]

Indeed, Taylor would have suffered the same lost profits from Mercedes-Benz's continuing refusal to recognize the dealership transfer regardless of whether Mercedes-Benz filed an administrative complaint with the DHSMV. Had Mercedes-Benz simply refused to recognize the transfer and not filed a complaint, there would have been no act on which Mercedes-Benz could even base its First Amendment argument. Yet, the harm to Taylor would have been identical — he would still have been denied the franchise. Certainly, it defies logic to argue that Mercedes-Benz could become completely immune from statutory liability for refusing a franchise transfer by filing an inoperative, meaningless administrative complaint. The act of filing a legally useless complaint cannot possibly be the genesis of absolute constitutional immunity from liability under the Dealer Protection Act when the harm to Taylor is the same regardless of this action.

The challenge procedure provided by Section 320.643(2)(a) cannot possibly serve to immunize an unsuccessful challenger from liability for the violation of the statute's substantive command. Mercedes-Benz's invalid "petitioning" activity "may not be used as the means or the pretext for achieving 'substantive evils'...which the legislature has the power to control."[4] *California Motor Transport*

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4 The jury instruction Mercedes-Benz received on its First Amendment defense recognized this legal principle:

> A party has a legal right to have its claim or defense determined in an appropriate court or other appropriate forum. However, such right does not excuse a party from compliance with the law. The right of access to courts may not be used to excuse a party from payment of damages, if any, for a wrongful act which is committed contrary to the law. [R 15-248-(20-21).]

Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972) (citation omitted). Legislatures are not prohibited from making certain conduct illegal " 'merely because the conduct was in part initiated, evidenced, or carried out by means of' " speech or writing. *Id.* at 514 (quoting *Giboney v. Empire Storage Co.,* 336 U.S. 490, 502 (1949)). If this were the case, violators of a statute could always create some "petition" to shield themselves from liability for engaging in the very conduct that the statute prohibits. *Litton Systems, Inc. v. American Tel. & Tel. Co.,* 700 F.2d 785, 806-07 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073 (1984). Petitioning activities are not immune "when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport,* 404 U.S. at 514.

Indeed, so long as a substantive violation of law is shown, the right to petition will not insulate a wrongdoer from liability even if a "petitioning" activity is the sole source of a party's injury, *e.g.,* damages based solely upon the expense of litigation. *See Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.,* 814 F.2d 358, 360, 372-75 (7th Cir. 1987). If the situation were otherwise, any claim by which a party obtained damages based upon the expense of litigation itself would violate the right to petition — *e.g.,* the tort of abuse of process or any attorney's fee-shifting statute. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 471-73 (7th Cir. 1982), *cert. denied,* 461 U.S. 958 (1983); *Premier Elec.,* 814 F.2d at 373.

Moreover, First Amendment protections for petitioning activity do not extend to Mercedes-Benz's administrative complaint, because Mercedes-Benz advocated no position and did not attempt to influence government action through its complaint. The *Noerr-Pennington* doctrine and the related right to petition protect only those activities which embody traditionally protected First Amendment values, *i.e.,* advocating a particular position before the government

and attempting to influence corresponding government action, as through lobbying or political discourse. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-41 (1961); United Mine Workers v. Pennington,* 381 U.S. 657, 669-70 (1965); *California Motor Transport,* 404 U.S. at 510-11. In short, the *Noerr-Pennington* doctrine is not implicated by petitioning activities which are "more economic than political in nature." *Todorov v. DCH Healthcare Auth.,* 921 F.2d 1438, 1446 n.14 (11th Cir. 1991).

Mercedes-Benz's decision to refuse to recognize the MSP-Taylor transfer was a purely private business decision on its part, "no element of which involved seeking to procure the passage or enforcement of laws." *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707 (1962). Merely because Mercedes-Benz sought to legitimize its continuing refusal to recognize the transfer through the ineffective and invalid invocation of a statutory challenge procedure does not immunize Mercedes-Benz for violating substantive statutory prohibitions. *Litton Systems,* 700 F.2d at 807; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.,* 690 F.2d 1240, 1263-65 (9th Cir. 1982), *cert. denied,* 459 U.S. 1227 (1983).

Indeed, Mercedes-Benz had no position whatsoever to advocate before the DHSMV when it filed its complaint. According to Mercedes-Benz, it was a hapless victim of conflicting claims of ownership in MSP's Mercedes-Benz franchise. [Pet. at 9.] Thus, in what was basically an interpleader action, Mercedes-Benz joined all parties with a colorable claim to the franchise and surrendered the franchise to the DHSMV for its determination of who was the rightful claimant to the franchise. *Id.* Mercedes-Benz asserted that it was entirely neutral as to the outcome of the administrative process.

Because Mercedes-Benz's administrative complaint pursued no fundamental, substantive right or furthered any particular position, Mercedes-Benz's complaint was not the type of petitioning activity aimed at influencing the government which is protected by the *Noerr-Pennington* doctrine or the First Amendment right to petition. Every legal pleading does not come "trailing clouds of First Amendment glory." *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 420 (7th Cir. 1988). Neither the market-place of ideas nor the vitality of public debate was enriched through Mercedes-Benz's facially deficient complaint. "[N]ot every legal gesture — not every legal pleading — is protected by the First Amendment." *Id.* at 419.

Additionally, the *Noerr-Pennington* doctrine and the right to petition protect only procedurally valid and lawfully recognized petitions. Petitioners only have "the right of access to agencies and courts, **within the limits, of course, of their prescribed procedures.**" *California Motor Transport,* 404 U.S. at 515 (emphasis added). Government must be able to place reasonable procedural restrictions on the right to petition. No absolute right to petition the government exists outside these procedures. If the right to petition were absolute, all rules of court, statutes of limitation, etc., would abridge the right to petition. In the instant case, Mercedes-Benz's "petition" facially violated statutory requirements as it failed to object to Taylor's qualifications and did not contain the required verification. Such an invalid "petition" could not possibly implicate First Amendment rights.

The right to petition exists to enable citizens to enlist the government's assistance in redressing legally recognized "grievances." Under Florida's dealership transfer law, Mercedes-Benz raised no statutorily permissible objection concerning a proposed transferee's qualifications. Because Mercedes-Benz recognized that Taylor was qualified

in every respect, it had no "grievance" about which it could petition under the statutory scheme. The right to petition will not protect petitioning efforts which ignore or defy the substantive rule of decision provided by statute. *Premier Elec.,* 814 F.2d at 375. Neither the *Noerr-Pennington* doctrine nor the right to petition protects Mercedes-Benz's efforts to claim more than the substantive law allows. *Id.* "A request for something that, if granted, is unlawful, is also unlawful." *Id.* at 376. Mercedes-Benz's conduct, including its complaint, was unlawful as Mercedes-Benz had no statutorily permissible reason to refuse the MSP-Taylor dealership transfer. Therefore, the right to petition cannot possibly immunize Mercedes-Benz's unlawful conduct in refusing to recognize the transfer.

In sum, the First Amendment right to petition is not remotely implicated by Mercedes-Benz's violation of Florida's dealership transfer law. The decision in this factually complex, diversity case addressed only state law issues on its face and did not address this First Amendment issue, or any federal issue, because Mercedes-Benz's arguments were facially meritless. As this case raises no federal constitutional issues, either explicitly or implicitly, there is no realistic basis for this Court's review.

II.

THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN NOT CERTIFYING TO THE FLORIDA SUPREME COURT EASILY DETERMINED, NON-DISPOSITIVE STATE LAW ISSUES WHICH WERE UNCONNECTED TO ANY FEDERAL ISSUES.

Mercedes-Benz asserts that the court of appeals "erred" in "refusing" to certify "dispositive" state law issues to the Florida Supreme Court. This position ignores several important points. First, as this Court made clear in its 1974 decision in *Lehman Brothers v. Schein,* 416 U.S. 386 (1974), the decision to certify a state law issue "in a given case rests in the sound discretion of the federal court." *Id.* at 391.

Second, Mercedes-Benz overlooks that Florida's Constitution only permits certification of a question of law "which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." FLA. CONST., Art. V, § 3(b)(6)(1980); FLA. R. APP. P. 9.030(a)(2)(C) (emphasis added).[5] Only three state law issues were considered by the court of appeals: 1) application of *res judicata* / collateral estoppel principles; 2) Taylor's standing to sue under Florida's Dealer Protection Act; and 3) whether

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5 Under Florida's "rather strict constitutional requirements," the Florida Supreme Court can only accept certified questions of law when "they are determinative of a particular case." G. Kogan & R. Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151, 1246-47 (1994) (Justice Gerald Kogan currently sits on the Florida Supreme Court). Florida's constitutional requirements are more restrictive than those outlined in the UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 49 (1967).

statutory damages should be trebled as a matter of law under that same act.

The application of *res judicata*/collateral estoppel principles is, of course, well established in Florida's case law. *See, e.g., Florida Real Estate Comm'n v. Harris,* 134 So.2d 785 (Fla. 1961), *cert. denied,* 371 U.S. 7 (1962); *Shearn v. Orlando Funeral Home,* 88 So.2d 591 (Fla. 1956); *Hay v. Salisbury,* 109 So. 617, 621 (Fla. 1926). Because application of these well-established doctrines was hardly a novel issue in Florida's jurisprudence, the court of appeals was obliged to determine this straightforward legal issue. As this Court warned in *Lehman Brothers,* federal courts should not abdicate their judicial duties through certification to state courts:

> [M]ere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit. We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory.

416 U.S. at 390-91. Because Florida law on *res judicata*/collateral estoppel was well-established, the court of appeals had no option but to apply this law to the case.

The second state law issue concerned Taylor's standing under Section 320.697, which created a statutory cause of action for "any person." Mercedes-Benz contended that "any person" actually meant an "existing Mercedes-Benz dealer." This issue obviously was not difficult for the court of appeals which simply applied well-established rules of

statutory construction governing "plain meaning."[6] Furthermore, there was guiding Florida case law which had found standing for a proposed transferee under a related provision in Florida's Dealer Protection Act. *See Bayview Buick-GMC Truck, Inc. v. GMC,* 597 So.2d 887 (Fla. 1st Dist. Ct. App. 1992). In any event, disposition of this issue could not determine the cause since MSP would continue to have a claim, regardless of the outcome of the decision on Taylor's standing.

The third state law issue concerned whether pecuniary damages should be trebled as a matter of law under Section 320.697, Florida Statutes. Again, Mercedes-Benz presents no substantive showing that the Florida Supreme Court would have reached a different conclusion than the court of appeals concerning the straightforward "plain meaning" of the treble damages statute, Section 320.697. Furthermore, this issue only involved the amount of damages, so it could not possibly determine the entire case. Since this damages issue was certainly non-dispositive, it could not have been certified to the state supreme court.

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6 Mercedes-Benz's assertion that a decision upholding Taylor's standing was inconsistent with *Gans v. Miller Brewing Co.,* 560 So.2d 281 (Fla. 4th Dist. Ct. App.), *review denied,* 574 So.2d 140 (Fla. 1990), has been consistently rejected as vacuous by every court in which Mercedes-Benz raised this argument. The statute in *Gans* was part of a completely different franchise law for beer distributors, which expressly limited remedies to the existing "distributor with whom [the franchisor] has a written contract." *Id.* at 282. In contrast, Florida's Automobile Dealer Protection Act creates remedies for "any person." After the Eleventh Circuit's decision in this case, the Florida Supreme Court made even clearer that a statutory remedy for "any person" means any person. *See Auto-Owners Ins. Co. v. Conquest,* 658 So.2d 928 (Fla. 1995) (statutory remedy for "any person" aggrieved under the Unfair Insurance Practices Act unambiguously includes any person, and is not limited to insureds.)

Mercedes-Benz misplaces its reliance on *Lehman Brothers* for yet another reason. In that case, a federal court in New York was attempting to determine unsettled state law issues in Florida, a "distant state." This Court noted that the federal circuit court judges in New York were " 'outsiders' lacking in the common exposure to local law which comes from sitting in the jurisdiction." *Id.* at 391. There is no such concern here, as the Eleventh Circuit is quite familiar with Florida law. Indeed, the court of appeals' decision was written by Judge Rosemary Barkett, immediate former Chief Justice of the Florida Supreme Court.[7]

Mercedes-Benz's reliance on several decisions of this Court certifying issues to state supreme courts is also misplaced. In each of those cases, the state law issues which were certified were necessary to or could avoid the disposition of a federal constitutional issue before this Court. *See Virginia v. American Booksellers Assoc.*, 484 U.S. 383 (1988) (certification of state issues regarding interpretation of state law necessary to determine potential First Amendment infringement); *Mills v. Rogers*, 457 U.S. 291 (1982) (remanded for consideration of certification of state constitutional issues concerning privacy interests which could avoid decision on federal constitutional grounds); *Zant v. Stephens*, 456 U.S. 410 (1982) (clarification of state's premises for applying death sentence necessary to determine whether sentence was an unconstitutional, cruel and unusual punishment); *Massachusetts v. Feeney*, 429 U.S. 66 (1976) (state issues of whether state attorney general was authorized to bring suit could avoid Supreme Court's need to determine case on federal constitutional grounds); *Bellotti v. Baird*, 428 U.S. 132 (1976) (certification of issue regarding

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7 Similarly, Judge Susan Black, joining in the court of appeals' decision, was a former Florida circuit court judge, as well as federal district court judge for the Middle District of Florida.

state abortion statute necessary to avoid federal constitutional issue under *Pullman* abstention doctrine); *Aldrich v. Aldrich,* 375 U.S. 249 (1963) (certification of validity of divorce provision necessary in order to assess full faith and credit claims); *cf. Kaiser Steel Corp. v. W.S. Ranch Co.,* 391 U.S. 593 (1968) (certification of state law issues not involved; only federal court abstention). In contrast, in the instant case, the state law issues have absolutely no connection to any federal constitutional issues, so there is no need for this Court to certify state law issues to determine or avoid determining a federal constitutional issue.

Since *Lehman Brothers,* this Court has not found it necessary to again remind the circuit courts of appeals about the state certification process. Indeed, the former Fifth Circuit has developed precedent, binding in the Eleventh Circuit, guiding the court of appeals' exercise of its discretion in certifying an issue to a state supreme court.[8] The factors to be considered were set out in *Florida v. Exxon Corp.,* 526 F.2d 266, 274-76 (5th Cir.), *cert. denied,* 425 U.S. 930 (1976), as follows:

> In determining whether to exercise our discretion in favor of certification, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law—statutes, judicial decisions, attorney general's opinions—to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical

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8 *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting as binding precedent former Fifth Circuit decisions prior to October 1, 1981).

> limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

Id. at 274-75 (footnotes omitted). The Eleventh Circuit expressly followed these factors in *Smigiel v. Aetna Casualty & Surety Co.*, 785 F.2d 922, 924-25 (11th Cir. 1986), specifically acknowledging the requirements of *Lehman Brothers.*[9]

Additional factors also support the court of appeals' exercise of its discretion not to certify the state law issues in this case. As was noted in *Florida v. Exxon,* the certification process can cause up to two (2) years delay, plus additional expense. Since the central dispute in this case began over ten (10) years ago, the Eleventh Circuit reasonably determined not to certify issues in this case which would cause even further delay in this case's disposition. Likewise, any concern over comity with the state courts, which was slight in the circumstances of interpreting this statutory scheme, was certainly given due consideration by Judge Rosemary Barkett, former Chief Justice of the Florida Supreme Court.

Contrary to Mercedes-Benz's assertions, the Eleventh Circuit did not "refuse" to certify any state law issues since Mercedes-Benz never requested, even on rehearing, that any issue be certified to the state supreme court. Indeed, Mercedes-Benz's suggestion in its petition to this Court is the first time it has raised this issue. Nevertheless, the panel

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9 The Eleventh Circuit makes frequent use of the certification procedure and has certified issues to the Florida Supreme Court as recently as this year. *See Mosher v. Speedstar, Inc.*, 52 F.3d 913, 917 (11th Cir. 1995) (espousing the usefulness of the certification process). Indeed, the current concern is the possible overuse of the certification procedure, leading to recent suggestions to limit its use. *See* G. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification,* 47 ARK. L. REV. 305 (1994).

of the Eleventh Circuit raised this issue itself at oral argument, and obviously considered and rejected certification, which was suggested by the dissenting judge.

The court of appeals properly exercised its discretion based on the straightforward nature and lack of closeness of the questions, as well as the non-dispositive character of the state law issues.[10] Based on these factors, as well as the needless delay and costs certification would create, there is no valid basis for concluding that the court of appeals abused its discretion by not certifying easily determined issues to the Florida Supreme Court.

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10 Additionally, the Florida Supreme Court had already denied review of the decision of the First District Court of Appeal which specifically held that Mercedes-Benz could only challenge the MSP-Taylor dealership transfer on the basis of the transferee's qualifications. *Mercedes-Benz*, 561 So.2d 620 (Fla. 1st Dist. Ct. App.), *review denied*, 574 So.2d 142 (Fla. 1990).

CONCLUSION

Based on the foregoing, there is certainly no real and embarrassing conflict between the court of appeals' decision in this case and decisions of this Court or other circuit courts which justify the Court's granting a petition for writ of certiorari. Likewise, there is no valid basis to conclude that the court of appeals abused its discretion in not certifying easily determined state law issues to the state supreme court. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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November, 1995

No. 95-590

IN THE

Supreme Court of the United States

October Term, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Petitioner,

v.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC., AND BILLY GRUBBS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPENDICES

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MERCEDES-BENZ OF NORTH AMERICA, a Florida corporation, Appellant/Cross-Appellee,

v.

MIKE SMITH PONTIAC GMC, INC., a Florida corporation, Appellee/Cross-Appellant,

v.

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Appellee.

MERCEDES-BENZ OF NORTH AMERICA, INC., Appellant,

v.

MIKE SMITH PONTIAC GMC, INC., Jerome Z. Ginsburg, Ronald Cutler, Terry Taylor, Billy R. Grubbs, Terry Taylor Investments, Inc., and Department of Highway Safety and Motor Vehicles, Appellees.

Nos. 87-2041, 87-2042.

District Court of Appeal of Florida, First District.

May 3, 1990.

Rehearing Denied June 14, 1990.

MINER, Judge.

This case involves consolidated appeals and a cross appeal from two final orders of the Department of Highway Safety and Motor Vehicles (Department). In Case No. 87-2042, the Department dismissed with prejudice appellant's complaint which sought to prevent a proposed transfer in ownership of an automobile dealership. In Case No. 87-2041, the Department dismissed as moot an action brought by appellee which challenged appellant's termination of appellee's franchise. We affirm.

In July 1983, appellant, Mercedes-Benz of North America (MBNA), and appellee, Mike Smith Pontiac GMC, Inc. (MSP), entered into a Mercedes-Benz Passenger Car Dealer Agreement, which permitted MSP to sell and service Mercedes-Benz automobiles. When it expired on December 31, 1983, a new agreement was entered into to cover the two-year period from January 1, 1984 through December 31, 1985. Paragraph 15D(g) of the agreement provided as follows:

> D. Dealer [MSP] and MBNA agree that the following acts or events, all within the control of the Dealer or originating from actions taken by Dealer or its management or owners, are so contrary to the spirit and purposes of this Dealer Agreement as to warrant its termination:
>
> ....
>
> (g) Any disagreement between or among the Dealer Operators or Owners of Dealer which in MBNA's opinion may adversely affect the conduct of Dealer's business or the interests of MBNA, providing the disagreement continues three (3) months after notice to Dealer by MBNA that the disagreement must be resolved.

In the summer of 1985 MBNA became aware of a dispute between MSP's dealer- operator and primary dealer-owner.[1]

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1 This dispute culminated in the ouster of the dealer-operator, Michael Smith, by the primary dealer-owner, Jerome Ginsburg. Apparently, Ginsburg owned seventy-five percent of MSP's stock, and held stock transfer documents executed in blank by Smith for the remaining twenty-five percent. Ginsburg also possessed undated letters of resignation executed by Smith. When Ginsburg used these documents to oust Smith in June 1985, Smith sought injunctive relief in Circuit Court for Volusia County. See *Mike Smith Pontiac, GMC, Inc. v. Smith,* 486 So.2d 89 (Fla. 5th DCA 1986).

By letter dated July 1, 1985, MBNA invoked Paragraph 15D(g) and advised MSP to resolve its management dispute within ninety days or face possible termination of the franchise agreement. By October 23, the ninety day period had expired, and MBNA sent a letter informing MSP that insufficient progress had been made in resolving the management dispute. The letter, which was signed by a Vice President of MBNA, charged breaches of various provisions in addition to Paragraph 15D(g), and concluded as follows:

> Therefore, in conformity with the Florida Franchise Practices Act, we hereby inform you of our intent to terminate your Mercedes-Benz Passenger Car Dealer Agreement on January 31, 1986 which is at least 90 days hence from the order to provide sufficient notice to affect the termination of the Agreement, we will extend the Dealer Agreement until January 31, 1986. This notice and extension is pursuant to the provisions of Paragraphs 15 and 16 of the Mercedes-Benz Passenger Car Dealer Agreement.[2]

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2 Paragraph 16 of the dealer agreement provides for the extension or renewal of the agreement:

> This Agreement can be extended or renewed only through an express written instrument to that effect and only if such instrument is duly executed on behalf of MBNA by [the President or a Vice President]. Any business relations of any nature whatsoever between MBNA and Dealer after the expiration of this Agreement or after its prior termination pursuant to Paragraph 15 of this Agreement, without such written extension or renewal shall not operate as an extension or renewal of this Agreement. Nevertheless, all such business relations, so long as they are continued, shall be governed by terms identical with the provisions of this Agreement.

On January 16, 1986, MSP filed an administrative complaint with the Department pursuant to section 320.641, Florida Statutes (1985), alleging unfair termination of the dealer agreement. Because the complaint was filed within the ninety day notice period, the dealer agreement continued in effect by operation of section 320.641(3), Florida Statutes (1985),[3] until the termination dispute was resolved.

In October 1986, prior to the final hearing, MSP proposed a transfer of the dealership to appellee, Ronald Cutler. On December 12, one week after the final hearing, MBNA informed MSP that it found Cutler an unacceptable transferee and would not approve the proposed transfer. On December 15, MBNA filed an administrative complaint to challenge the proposed transfer. Although section 320.643(2), Florida Statutes (1985), was the basis for the complaint, MBNA asserted that it was not required to comply with the statute because its dealer agreement with

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3 Section 320.641(3) provides as follows:

> Any motor vehicle dealer whose franchise agreement is discontinued, canceled, not renewed, modified, or replaced may, within the 90-day notice period, file with the department a verified complaint for a determination of whether such action is an unfair or prohibited discontinuation, cancellation, nonrenewal, modification, or replacement. Agreements and certificates of appointment shall continue in effect until final determination by the department of the issues raised in such complaint by the motor vehicle dealer, and, except pursuant to s. 320.643, no replacement motor vehicle dealer shall be named for this point or location to engage in business prior to the final adjudication by the department on the complaint.

Section 320.643, Florida Statutes (1985), establishes the procedure by which a dealer may transfer his franchise to a transferee who the manufacturer finds acceptable or, at least, does not find unacceptable.

MSP was executed prior to the statute's enactment. According to MBNA, the existing agreement was executed on January 1, 1984, and was therefore not subject to section 320.643(2) which came into effect on May 31, 1984. The hearing officer stayed MBNA's transfer challenge pending the outcome of MSP's termination proceeding.

The hearing officer issued his recommended order in the termination action on May 1, 1987. MBNA was justified in terminating the dealership based upon the management dispute within MSP. Apparently, negotiations had been ongoing between MBNA, MSP and the proposed transferee, because shortly after issuance of the recommended order MBNA filed a notification of status in its transfer challenge; according to MBNA, a transfer had been approved on modified terms, and its transfer challenge would become moot upon closing of the sale.

However, in June 1987, MSP informed MBNA that the proposed transfer would not take place; instead, MSP proposed a new transfer to appellees Terry Taylor, Billy Grubbs, and Terry Taylor Investments.[4] On August 28, 1987, MBNA, having previously abandoned its challenge to the Cutler transfer, filed a new complaint challenging the Taylor transfer. Again, MBNA's complaint was filed pursuant to section 320.643(2), and again, MBNA asserted that the statute could not be applied to its agreement with MSP. The complaint, which was verified by MBNA's President, did not allege that the Taylor transferees were unqualified, nor did it explain why MBNA found them unacceptable. In addition, the verification, which was required by section 320.643(2), merely stated: "I have read the above Complaint and, to the best of my knowledge, the allegations are true

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4 This caused Cutler to bring an action against MSP and its dealer- owner, Jerome Ginsburg, seeking specific performance of the sale agreement between Cutler and MSP.

and correct." MSP responded with a motion to dismiss the complaint for its failure to challenge the qualifications of the proposed transferees, and for the inadequacy of the verification.

On November 9, 1987, the Department granted MSP's motion on the grounds asserted therein, and dismissed MBNA's complaint with prejudice. In addition, the Department entered a final order dismissing MSP's termination action as moot. According to the Department, MBNA failed to file a proper transfer challenge within the sixty day period prescribed by section 320.643(2). Consequently, the MSP agreement was amended by operation of law and the Taylor transferees were now the holders of the MBNA franchise. This appeal ensued.

On appeal, MBNA argues that the Department based the dismissal of the transfer challenge upon certain provisions in section 320.643, Florida Statutes, which were not in existence at the time the parties executed the dealer agreement. MBNA points out that on January 1, 1984, when the two-year extension of the agreement became effective, there was no requirement that a licensee[5] file a verified complaint in order to prevent a proposed transfer of the dealership. Rather, it was sufficient that the licensee inform the dealer in writing within sixty days of notice of the proposed transfer, that the proposed transferee was unacceptable. Although the licensee was required to provide "material reasons" for rejecting the transferee, and acceptance could not be withheld unreasonably, it was nowhere required that the licensee justify

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5 Within the context of Florida's dealer protection scheme, a "licensee" includes the manufacturers, distributors and importers that are required to be licensed by the Department in order to have their vehicles sold in this state. See §§ 320.60(8) and 320.61, Fla.Stat. (1985). MBNA is included within this definition.

its rejection by making reference to the particular shortcomings in the transferee's character or business experience. *See* § 320.643, Fla.Stat. (1983). According to MBNA, the application of amended section 320.643 constituted an impairment of the dealer agreement in violation of the Florida Constitution, the U.S. Constitution, and section 320.701, Florida Statutes (1985).[6] MBNA further argues that even if the amendments are found applicable, its complaint was properly verified and provided valid grounds for challenging the proposed transfer.

The main issue on appeal concerns the applicability of the extensive amendments in chapter 84-69, Laws of Florida, to the dealer agreement between MBNA and MSP. These amendments, which refined and particularized portions of Florida's dealer protection scheme, provided a procedure through which a licensee could challenge a proposed transfer. As amended, section 320.643(2)(a), Florida Statutes (1985), requires that licensees be notified of a proposed transfer, and further provides:

> A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that the proposed transferee is not a

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6 Section 320.701, Florida Statutes (1985), was included among the 1984 amendments to specifically address the question of applicability to existing franchise agreements. The statute provides as follows:

> This act applies to all presently existing or established systems of distribution of motor vehicles in this state, except to the extent that such application would impair contractual agreements in violation of the Florida Constitution or Federal Constitution. All agreements renewed or entered into subsequent to May 31, 1984, will be governed by this act.

> person qualified to be a transferee under this section.... If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order.

Ch. 84-69, § 8, Laws of Fla. The effective date of the amendments was May 31, 1984. Ch. 84-69, § 14, Laws of Fla.

MBNA correctly points out that the two-year extension of the dealer agreement predated the 1984 amendments. However, we agree with MSP that a further extension occurred in October 1985, when MBNA communicated its intent to terminate the franchise and extended the agreement for one month. Although we recognize that the extension was MBNA's means of providing the requisite ninety days notice prior to termination,[7] we note that this extension was accomplished pursuant to Paragraph 16 of the dealer agreement and was not merely an unspoken continuation of the franchise relationship. Because the dealer agreement was extended after the effective date of the amendments, application of the amended version of section 320.643 does not operate to impair MBNA's contractual rights.

We agree with the Department that MBNA's complaint did not meet the requirements of section 320.643(2)(a), Florida Statutes (1985). The transfer challenge envisioned

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7 See § 320.641(1)(a), Fla.Stat. (1983).

in this section must allege that the proposed transferee is not qualified under the terms of the statute. The only "qualifications" referred to in section 320.643 are the transferee's moral character, and ability to meet any reasonable and uniformly applied standard of the licensee relating to business experience.[8] In the instant case, MBNA's complaint was silent as to the qualifications of the Taylor transferees. In fact, the only basis for MBNA's complaint was its fear that Cutler, the first-proposed transferee, would successfully force a transfer under the original transfer agreement.[9] Since this is not a proper basis for a transfer challenge, the Department correctly dismissed the complaint. The complaint's verification, which was conditional and therefore inadequate, constituted further grounds for dismissal. *See United Bonding Insurance Co. v. Dura-Stress, Inc.*, 243 So.2d 244 (Fla. 2d DCA 1971). Although MBNA filed an amended complaint with proper verification, the complaint remained deficient in failing to challenge the qualifications of the proposed transferees. In addition, the amended complaint was not submitted until after the time for filing had expired and the final order of dismissal had been entered.

MBNA also asserts that the termination action was improperly dismissed as moot based upon the Department's mistaken belief that a proposed transfer must preempt ongoing termination proceedings. According to MBNA, the law does not lend such deference to transfers. MBNA argues

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8 Although the notice of transfer must include information on the transferee's financial qualifications, a transferee's lack of finances is not mentioned as a basis for the licensee's withholding acceptance under subsection 1 or for bringing a challenge under subsection 2. We do not offer an opinion as to whether or under what circumstances financial qualifications constitute fertile grounds for challenge under section 320.643.

9 See note 4, infra.

that such a result would make termination a dead letter because any attempted termination would be subject to indefinite and seemingly limitless delay as the dealer could propose a succession of transfers.

We disagree with MBNA, and find that the Department was not required to proceed with the termination action in the face of an impending transfer. When a licensee challenges a proposed transfer under section 320.643, the franchise agreement is preserved until the matter is resolved; the Department is required to expedite the transfer challenge. *See* § 320.643(2)(b), Fla.Stat. (1985). Even if the dealer has already invoked section 320.641(3) to contest an attempted termination of the franchise agreement, the termination statute clearly envisions that a transfer under section 320.643 can take place. The termination statute provides that a replacement dealer can be named under section 320.643 in the midst of termination proceedings. Thus, the Department correctly dismissed the termination action as moot after the transfer took place by operation of law.

We also disagree with MBNA's assertion that there was material error in the Department's failure to issue a final order within ninety days of the recommended order. Shortly after issuance of the recommended order, MBNA filed its notification of status which announced that a transfer had been agreed upon and the termination action would shortly become moot. The resulting delay was necessitated by the transfer, and did not impair the fairness of the termination proceedings or the correctness of the action. *See Department of Transportation v. Courtelis Co.,* 436 So.2d 92 (Fla.1983); *Department of Business Regulation v. Hyman,* 417 So.2d 671 (Fla.1982); § 120.68(8), Fla.Stat. (1985).

Lastly, we find no merit in MSP's cross appeal, which asserts that the termination action should not have been dismissed as moot while its request for attorney's fees

remained to be resolved. The actual controversy in the termination action became moot with the transfer of the dealership. The mere possibility that MSP could eventually be awarded attorney's fees is an insufficient basis for continuing otherwise purposeless litigation.

In sum, we find that the Department correctly dismissed MBNA's flawed transfer challenge. A transfer then took place by operation of law, and the termination action was properly dismissed as moot. Thus, we affirm the Department's action.

SMITH, J., and FORD L. THOMPSON, Associate Judge, concur.

[1]320.643 Transfer, assignment, or sale of franchise agreements.—

(1) A motor vehicle dealer shall not transfer, assign, or sell a franchise agreement to another person unless the dealer first notifies the licensee of his decision to make such transfer, by written notice setting forth the prospective transferee's name, address, financial qualification, and business experience during the previous 5 years. The licensee shall, in writing, within 60 days after receipt of such notice, inform the dealer either of his approval of the transfer, assignment, or sale or of the unacceptability of the proposed transferee, setting forth the material reasons for the rejection. If the licensee does not so inform the dealer within the 60-day period, its approval of the proposed transfer is deemed granted. No such transfer, assignment, or sale will be valid unless the transferee agrees in writing to comply with all requirements of the franchise then in effect. Notwithstanding the terms of any franchise agreement, the acceptance by the licensee of the proposed transferee shall not be unreasonably withheld. For the purposes of this section, the refusal by the licensee to accept a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards, if any, of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers is presumed to be unreasonable.

(2)(a) Notwithstanding the terms of any franchise agreement, a licensee shall not, by contract or otherwise, fail or refuse to give effect to, prevent, prohibit, or penalize, or attempt to refuse to give effect to, prevent, prohibit, or penalize, any motor vehicle dealer or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest therein from selling, assigning, transferring, alienating, or otherwise disposing of, in whole or in part, the equity interest of any of them in such motor

vehicle dealer to any other person or persons, including a corporation established or existing for the purpose of owning or holding the stock or ownership interests of other entities, unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not, or whose controlling executive management is not, of good moral character. A motor vehicle dealer, or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest in the motor vehicle dealer, who desires to sell, assign, transfer, alienate, or otherwise dispose of any interest in such motor vehicle dealer shall notify, or cause the proposed transferee to so notify, the licensee, in writing, of the identity and address of the proposed transferee. A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that the proposed transferee is not a person qualified to be a transferee under this section. The licensee has the burden of proof with respect to all issues raised by such verified complaint. The department shall determine, and enter an order providing, that the proposed transferee either is qualified or is not and cannot be qualified for specified reasons; or the order may provide the conditions under which a proposed transferee would be qualified. If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order.

(b) During the pendency of any such hearing, the franchise agreement of the motor vehicle dealer shall continue

in effect in accordance with its terms. The department shall expedite any determination requested under this section.

History.—s. 7, ch. 80-217; s. 2, ch. 81-318; s. 8, ch. 84-69.

[1]**Note.**—Repealed effective October 1, 1998, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**320.697 Civil damages.**—Any person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of ss. 320.60-320.70, notwithstanding the existence of any other remedies under ss. 320.60-320.70, has a cause of action against the licensee for damages and may recover damages therefor in any court of competent jurisdiction in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee to be assessed by the court. Upon a prima facie showing by the person bringing the action that such a violation by the licensee has occurred, the burden of proof shall then be upon the licensee to prove that such violation or unfair practice did not occur.

History.—s. 17, ch. 70-424; s. 3, ch. 76-168; s. 96, ch. 77-104; s. 1, ch. 77-457; ss. 16, 17, ch. 80-217; ss. 2, 3, ch. 81-318; s. 11, ch. 84-69.

[1]**Note.**—Repealed effective October 1, 1988, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.